United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

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Court of Appeals, District of Columbia

OCTOBER TERM, 1909.

No. 2084. 682

NOEL W. BARKSDALE, EXECUTOR OF THE ESTATE OF CHARLES R. MORGAN, DECEASED, APPELLANT,

vs.

EDWARD F. MORGAN, HELEN E. MORGAN, JOHN R. MORGAN, ET AL.

APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF COLUMBIA

FILED NOVEMBER 5, 1909.

COURT OF APPEALS OF THE DISTRICT OF COLUMBIA

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EDWARD F. MORGAN, HELEN E. MORGAN, JOHN R. MORGAN, AGNES V. HOPPE, MARIE M. L. MORGAN, CHARLES H. MORGAN, MALCOLM A. MORGAN, CHARLES GUY MORGAN, AND HELEN HOPPE, APPELLEES.

APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF COLUMBIA

INDEX.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., NOVEMBER 5, 1909.

In the Court of Appeals of the District of Columbia.

No. 2084.

NOEL W. BARKSDALE, Executor, &c., Appellant,
vs.
EDWARD F. MORGAN et al.

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a Supreme Court of the District of Columbia.

Equity. No. 28387.

NOEL W. BARKSDALE, Executor of the Estate of Charles R. Morgan, Deceased,
vs.
EDWARD F. MORGAN, HELEN E. MORGAN, JOHN R. MORGAN, Agnes V. Hoppe, Marie M. L. Morgan, Charles H. Morgan, Malcolm A. Morgan, Charles Guy Morgan, and Helen Hoppe, Defendants.

UNITED STATES OF AMERICA,
District of Columbia, ss:

Be it remembered, That in the Supreme Court of the District of Columbia, at the City of Washington, in said District, at the times hereinafter mentioned, the following papers were filed and proceedings had in the above-entitled cause, to wit:

1 *Bill.*

Filed Mar. 15, 1909.

In the Supreme Court of the District of Columbia.

Equity. No. 28387.

NOEL W. BARKSDALE, Executor of the Estate of Charles R. Morgan, Deceased,
vs.
EDWARD F. MORGAN, HELEN E. MORGAN, JOHN R. MORGAN, Agnes V. Hoppe, Marie M. L. Morgan, Charles H. Morgan, Malcolm A. Morgan, Charles Guy Morgan, and Helen Hoppe, Defendants.

Your complainant, Noel W. Barksdale, respectfully shows to the Court:

1. That Noel W. Barksdale is a citizen of the United States and

a resident of the District of Columbia and brings this suit as the Executor of the last will and testament of Charles R. Morgan, deceased, as hereinafter shown.

2. That Edward F. Morgan and John R. Morgan are the only brothers of Charles R. Morgan and Agnes V. Hoppe is the only sister. That Helen E. Morgan is the wife of Edward F. Morgan and they have had no children. That upon information complainant alleges that Charles R. Morgan left three infant children, viz: Marie M. L. Morgan born April 15, 1892; Charles H. Morgan born June 4, 1898, and Malcolm A. Morgan born May 11, 1902. John R. Morgan has had only one child, the defendant Charles Guy Morgan, who was born May 31, 1890. Agnes V. Hoppe has had only one child, the defendant Helen Hoppe who was born —— 1902. All the aforesaid parties are citizens of the United
2 States and residents of the District of Columbia.

3. That Edward F. Morgan, Helen E. Morgan, John R. Morgan and Agnes V. Hoppe are sued as devisees under the will of Charles R. Morgan. Marie M. L. Morgan, Charles H. Morgan and Malcolm A. Morgan are sued as the only heirs at law of Charles R. Morgan. Charles Guy Morgan and Helen Hoppe are sued as contingent remaindermen and the only persons in being who can or would take as survivors of the life tenant under paragraph three of the will of Charles R. Morgan hereinafter referred to.

4. That Charles R. Morgan, late a resident of the District of Columbia, died in said District on the 24th day of October, 1905 leaving a last will and testament dated February 23, 1905, by and under the terms of which he appointed complainant as Executor. That said will was filed in the office of the register of Wills on October 31, 1905, and on November 6, 1905, your complainant filed his petition asking that said will be admitted to probate and record. A copy of said will is herewith filed and marked, "Exhibit A."

5. That after the filing of the petition for probate and record of said will a guardian *ad litem* was appointed by the Court to represent and answer the said petition for said Morgan infants and on December 6, 1905, a caveat was filed by said guardian on behalf of said children and upon answer of the executor to said caveat the court on December 20, 1905, framed issues for trial by jury as to whether the will was in due form of law, whether the testator was of sound and disposing mind, and whether the will was procured
3 by fraud or undue influence.

6. That thereafter, to wit, December 18, 1906, a trial of said issues was had before a jury and said jury on December 22, 1906, returned a verdict finding that Charles R. Morgan at the time of the execution of said will was not of sound and disposing mind and that said execution was procured by fraud. Judgment was given on this verdict and the will was set aside by the Court and from the order setting said will aside, an appeal was noted by the Executor and the case was carried to the Court of Appeals for the District of Columbia. That after a hearing in said Court a decision was handed down on February 12, 1908, in which said judgment was

reversed and the cause remanded with directions to set aside the verdict and order a new trial.

7. That thereafter the defendants, Edward F. Morgan, Helen E. Morgan, Agnes V. Hoppe and John R. Morgan and the representatives of the infants of Charles R. Morgan agreed to compromise the interests of all parties concerned rather than to incur the costs and expenses of another trial and on the 9th day of June, 1908 the said parties entered into a compromise agreement, a copy of which is herewith filed and marked "Exhibit B."

8. That pursuant to said agreement and in order to carry its provisions into effect the aforesaid issues were again submitted to a jury on June 11, 1908, and said jury by its verdict found that at the time of the execution of said will the said Charles R. Morgan was of sound and disposing mind and that said execution was not procured by fraud and upon this verdict the Court on June 12,
4 1908 admitted said will to probate and record and granted letters testamentary unto your complainant, a copy of which is herewith filed and marked, "Exhibit C". John R. Morgan, Agnes V. Hoppe, Edward F. Morgan and Helen E. Morgan thereafter executed and delivered a deed unto Marie M. L. Morgan, Charles H. Morgan and Malcolm A. Morgan dated 15th day of June 1908, by which they conveyed a one half undivided interest in and to all the property and estate owned by Charles R. Morgan at the time of his death and also an undivided one half interest in and to the 20,000 square feet of property whereon was situated the house of the said Charles R. Morgan more particularly described in the deed recorded in Liber 3157 folio 51 one of the land records for the District of Columbia, a copy of which is herewith filed and marked "Exhibit D."

9. That thereafter about June 22, 1908, Edward F. Morgan and Helen E. Morgan filed an original bill on the equity side of the Supreme Court of the District of Columbia, the same being Equity No. 27,880 against John R. Morgan, Agnes V. Hoppe, Marie M. L. Morgan, Charles H. Morgan, Malcolm A. Morgan, Samuel M. Brosius, Andrew Wilson, Trustee and Executor, asking for partition by sale of the two pieces of real estate lately owned by the said Charles R. Morgan and after all parties had answered and testimony was taken the Court on 30 day of September 1908 passed a decree directing a sale of said property and appointing J. K. M. Norton, Michael J. Colbert, Robinson White and Noel W. Barksdale, trustees to make sale and said property was thereafter offered at public auction and the 20,000 square feet was sold for $5700 and the interest of Charles R. Morgan in the other property was sold for
5 $13375.

10. That the purchaser at said sale employed a Title Company to pass upon the title to said property and upon examination of the records the Title Company was of the opinion that under the terms of the will of the said Charles R. Morgan the said Edward F. Morgan, Helen E. Morgan, John R. Morgan and Agnes V. Hoppe were only seized of a life estate in the residue of the estate of Charles R. Morgan as described in the third paragraph of the said will and therefore

they could not convey a one half interest in the estate of Charled R. Morgan as the estate was vested in them and their survivor and the children of the survivor, under section three of the aforesaid will. That there were already persons in being who might take upon the death of the survivors and they were not before the Court and were not parties to the will contract or the compromise agreement and could not and would not be bound by either.

11. That thereafter it was agreed among all the parties that the property should be sold under the trusts, all the notes secured thereby being past due. In accordance with said agreement the said property was advertised by the trustees under the deeds of trust and sold on February 20, 1909, and the 20000 square feet was sold for $5700 cash and the half interest in the acreage property was sold for $13375 cash, and the said trustees after payment of all taxes and expenses of sale amounting to $1034.72 turned over to the complainant $14882.62 in addition to which complainant has $184.44 on hand from sales of personal property of said estate. A statement of the Trustee's account is filed herewith marked "Ex-
6 hibit E."

12. That it was the intention of complainant and all parties to the aforesaid compromise agreement that the infants of Charles R. Morgan should have an absolute fee simple interest in and to one half of the estate of Charles R. Morgan and take their interest absolutely and the said Edward F. Morgan, Helen E. Morgan, John R. Morgan and Agnes V. Hoppe as well as complainant have signified their willingness and desire to carry into effect the provisions of said agreement and they are willing to take their several shares according to the provisions of the will as construed by this Court and are willing to have their shares invested as the Court may direct.

13. That complainant is of the opinion that the agreement as made is a fair and equitable one for all parties concerned, and should be carried into full effect. That he is very doubtful if the will would ever be sustained by any jury on account of the previous mental history of testator and the provisions of the will disinheriting testator's infants and especially in the light of the experience of one trial before a jury. That the estate is so small that the expenses of litigation will soon exhaust the assets, and a distribution and settlement of said estate would be greatly facilitated, if made under direction of this court, which complainant is willing to do, as he is in doubt as to what distribution to make and is entitled to the instruction of the Court.

Premises considered, Complainant prays:

1. That Edward F. Morgan, Helen E. Morgan, John R. Morgan, and Agnes V. Hoppe, Marie M. L. Morgan, Charles H. Mor-
7 gan, Malcolm A. Morgan, Charles Guy Morgan and Helen Hoppe may be made parties hereto by the services of process from this court requiring them to enter their appearance herein by a day certain.

2. That the Court will appoint a guardian *ad litem* for the Infants Marie M. L. Morgan, Charles H. Morgan, Malcolm A. Morgan, Charles Guy Morgan and Helen Hoppe, to appear and answer for them.

3. That the Court may ratify and approve the aforesaid compromise agreement and direct complainant to make distribution under order of this Court.

4. That complainant be required to bring the proceeds of said estate into this Court and make settlement under this Court's direction.

5. That this Court may appoint a Trustee or Trustees to invest one half of the residue of the estate for the benefit of the survivor and the children of the survivor.

6. That complainant may have such other and further relief as to this Court *amy* seem proper.

NOEL W. BARKSDALE,
Complainant.

WILSON & BARKSDALE,
Solicitors for Complainant.

Noel W. Barksdale on oath says he has read the foregoing bill by him subscribed and knows the contents thereof; that the statements therein made of his personal knowledge are true and those
8 made upon information and belief he believes to be true.

NOEL W. BARKSDALE.

Subscribed and sworn to before me this 15th day of March, 1909.

J. R. YOUNG, *Cl'k,*
By F. E. CUNNINGHAM,
Asst. Clk.

9 EXHIBIT "B."

ALEXANDRIA, VIRGINIA, *June* 9, 1908.

GENTLEMEN: Representing the children of Charles R. Morgan I make the following proposition for settlement of all controversies under the will of and touching the estate of Charles R. Morgan, deceased.

1st. The will shall be admitted to probate.

2nd. The estate of Charles R. Morgan, after the payment of all debts shall be equally divided in value one half to be the property of the children of Charles R. Morgan as of the date of the death of Charles R. Morgan and the other half to be the property of the devisees under the will of Charles R. Morgan. A deed to be made to said children for said one half. The sum of One Thousand Dollars to be considered as a debt due by the estate *to* Charles R. Morgan to Edward F. Morgan, with interest from the date of note held by him.

3d. Edward F. Morgan to convey to the estate of Charles R. Morgan the interest he took under a deed from Charles R. Morgan dated July 31, 1905.

Very truly yours, J. K. M. NORTON,
Att'y for Children of Charles R. Morgan.

Accepted on the conditions set out on the following page.

AGNES M. HOPPE.
HELEN E. MORGAN.
EDWARD F. MORGAN.
JOHN R. MORGAN.

10 That the shares of the devisees as to their one half shall go according to the provisions of the will; that is that Edward F. and Helen E. Morgan shall take one half interest of the 20000 square feet mentioned in the will and the residue of the one half shall go one sixth to John R. Morgan, one sixth to Edward F. Morgan and one sixth to Agnes V. Hoppe.

Provided that E. F. Morgan and Helen E. Morgan shall be exempt from payment of rent for use and occupation of said 20,000 square feet up to the date of the probate of this will on condition that they pay all taxes on said 20000 square feet to this date and shall not be entitled to any credits for repairs.

Provided that the 20,000 square feet heretofore named, shall bear its pro rata of the indebtedness of the estate and in distribution of the balance of the estate as herein provided there shall be such a marshalling of assets as shall effect the provision.

HELEN E. MORGAN.
EDWARD F. MORGAN.
JOHN R. MORGAN.

11 EXHIBIT "C."

In the Supreme Court of the District of Columbia, Holding a Probate Court.

DISTRICT OF COLUMBIA, *To wit:*

The United States of America, to all persons to whom these presents shall come, Greeting:

Know ye, that the last will and testament of Charles R. Morgan, late of the District of Columbia, deceased, hath in due form of law been exhibited, proved and recorded in the Office of the Register of Wills of the District of Columbia, Clerk of the Probate Court, a copy of which is to these presents annexed, and administration of all the money, goods, chattels, rights, and credits of the deceased is hereby granted and committed unto Noel W. Barksdale the executor by the said will appointed.

Witness the Honorable Harry M. Clabaugh, Chief Justice of said Court, this 15 day of June, A. D., 1908.

Attest:

[SEAL.] WM. C. TAYLOR,
Deputy Register of Wills for the District of Columbia, Clerk of the Probate Court.

Case No. 13,262.

12 I, Charles R. Morgan, of the District of Columbia, being of sound and disposing mind, and capable of executing a valid deed or contract, do hereby make and declare this my last will and testament.

1. I direct my executor, hereinafter named, to pay all my just debts.

2. I hereby devise my house and lot situated in the District of

Columbia and described as Beginning at a point in the division line between the land of the Chevy Chase Land Company and the land belonging to said estate, said point being North 10° 34′ East five hundred and forty-two and four hundredths feet (542.4 feet) from stone at the Southwest corner of the land now owned by said John R. Morgan, one of the grantors, thence with said division line north 10° 34′ East feet, thence East 101.72 feet, thence South 10° 34′ West 200 feet, thence West 101.72 feet to the beginning, containing 20,000 square feet more or less, absolutely and in fee simple to my brother, Edward F. Morgan, and his wife, Helen E. Morgan, as joint tenants with the right of survivorship and with the right of disposing of the same by sale. Upon the death of the survivor, I devise the same to his or her children. If no such children then it shall become a part of the residue of my estate hereinafter disposed of.

3. I give and devise all the rest and residue of my estate, real personal and mixed of whatsoever nature and wheresoever found, to my two brothers; John R. Morgan and Edward F. Morgan, and my sister Agnes V. Hoppe, to be equally divided between them. Upon the death of any one before or after my death, then his or her share shall go to the survivors or survivor. And upon the
13 death of the survivor, then his or her share shall go to the children of the survivor.

4. I make this will with the full knowledge that I am depriving my two children, Mamie Morgan and Harry Morgan, of any share in my estate, but I do so because I do not want them to have one dollar of my property.

5. I hereby nominate Noel W. Barksdale as the Executor of this my last will and testament.

In Witness Whereof I have hereunto set my hand and seal on the 23rd day of February 1905.

CHARLES R. MORGAN. [SEAL.]

Signed, sealed and declared by Charles Morgan as and for his last will and testament, in our presence, who at his request, in his presence, and in the presence of each other, have signed the same as witnesses.

JOSEPH R. FAGUE, 504 *E street N. W.*
BARAK T. GRAVES, 1406 *P Street, N. W.*
ANDREW WILSON, 504 *E street N. W.*

14 Supreme Court of the District of Columbia, Holding a Probate Court.

DISTRICT OF COLUMBIA, *To wit:*

On this 31st day of October, A. D., 1905 personally appeared Noel W. Barksdale who on oath says that he does not know of any will or codicil of Charles R. Morgan late of said District, deceased, other than the foregoing instrument of writing dated February 23,

1905; that he received the same from his safe and that said Charles R. Morgan died on or about the 24th day of October 1905.

NOEL W. BARKSDALE,
504 E St. N. W.

Sworn to and subscribed before me,

WM. C. TAYLOR,
Deputy Register of Wills for the District of Columbia,
Clerk of the Probate Court.

15 Supreme Court of the District of Columbia, Holding Probate Court.

THURSDAY, *June* 11, 1908.

Mr. Justice Barnard Presiding.

No. 13262. Adm. Doc. 34.

In re ESTATE OF CHARLES R. MORGAN, Deceased.

This cause coming on to be heard it is ordered by the Court, with consent of the Justice holding Criminal Court Numbered Two (2), that the issues in this cause be tried by the jury summoned and now in attendance upon that Court; whereupon upon consideration thereof, it is further ordered by the Court, that the Caveatees, Edward F. Morgan, Helen E. Morgan, John R. Morgan and Agnes V. Hoppe, shall be plaintiffs, and that the Caveators Marie L. Morgan, Helen E. Morgan and Malcolm A. Morgan, shall be defendants in the trial of said issues: whereupon, come here the (caveatees) Plaintiffs, by their attorneys, Wilson and Barksdale, and the (Caveators) Defendants by their attorney J. M. K. Norton, and a jury of good and lawful men of the District of Columbia, to wit:

William Volkman.	Louis Eiseman.	William H. Dabney.
Carter B. Braxton.	John G. Lunsford.	Charles F. Little.
William A. Lusby.	John R. Peak.	Thomas H. Maxwell.
Charles J. Bogan.	Bernard Leonard.	Dennis Connor.

who, being duly sworn to try and true answers make to said issues after the case is given them in charge, upon their oath say:

In answer to the first issue:

16 Was the certain paper writing bearing date February 23, 1905, and propounded as and for the last will and testament of the said Charles R. Morgan executed by him, the said Charles R. Morgan in the presence of the witnesses whose names appear to be subscribed thereto, in attestation of the same, and otherwise in due form of law?

They answer "Yes".

In answer to the second issue:

At the time of the alleged execution of the said paper writing,

was he, the said Charles R. Morgan, of sound and disposing mind and capable of executing a valid deed or contract?

They answer "Yes".

In answer to the third issue:

Was the execution of the said paper writing procured by the fraud of Edward F. Morgan, Agnes V. Hoppe, or any other person or persons?

They answer "No".

In answer to the fourth issue:

Was the execution of the said paper writing procured by or through the undue influence of the said Edward F. Morgan, Agnes V. Hoppe, or of any other person or persons?

They answer "No".

17 Supreme Court of the District of Columbia, Holding Probate Court.

DISTRICT OF COLUMBIA, *To wit:*

I, Wm. C. Taylor, Deputy Register of Wills for the District of Columbia, Clerk of the Probate Court, do hereby certify, That the foregoing is a true copy of the original will of Charles R. Morgan deceased, and the proof thereof, filed and recorded in the office of the Register of Wills for the District of Columbia, Clerk of the Probate Court aforesaid; and that the said will after having been duly proven, as will appear by the proof thereto attached, was, by order of the said Court, in accordance with the laws of the District of Columbia, admitted to probate and record on the 12th day of June, A. D., one thousand nine hundred and eight.

I further certify, That said will was duly executed and proved agreeably to the laws and usages of the District of Columbia, and that I have compared the foregoing copy of said will, and the proof thereof, with the original record in said office, and find it to be a full, true and correct transcript thereof.

Witness my hand and the seal of the said Probate Court this 15th day of June, A. D., 1908.

[SEAL.] WM. C. TAYLOR,
Deputy Register of Wills for the District of Columbia,
Clerk of the Probate Court.

18 EXHIBIT "D."

This deed made this 15th day of June 1908 by and between John R. Morgan, Lena Morgan, his wife, Agnes V. Hoppe, Edward F. Morgan, and Helen E. Morgan, his wife, of the District of Columbia, parties of the first part, and Marie M. L. Morgan, Charles H. Morgan and Malcolm A. Morgan, children and sole heirs of Charles R. Morgan, deceased, all of the same place, parties of the second part, witnesseth:

Whereas, by a certain compromise agreement entered into by and between the parties hereto on the 9th day of June 1908 and filed

in Probate Court in Administration No. 13262, it was agreed that the entire estate of the late Charles R. Morgan after the payment of all debts, upon the conditions therein stated should be equally divided in value one half to be the property of the said children and the other half to be the property of the devisees under the will of Charles R. Morgan.

And whereas, it was further agreed that Edward F. Morgan one of the parties of the first part, should convey to the estate of Charles R. Morgan the interest he took under a deed from Charles R. Morgan dated July 31, 1905.

Now therefore, in order to carry into effect the said compromise agreement, the parties of the first part in consideration of the premises and of Ten Dollars to them paid by the parties of the second part have granted and by these presents do grant unto the parties of the second part, their heirs and assigns forever a one half undivided interest in and to all the property and estate owned by the said Charles R. Morgan at the time of his death of whatsoever nature and wheresover found and also an undivided one half interest in and to the following described land and premises situate lying and being in the City of Washington, District of Columbia and described as follows: Beginning at a point in the division line between the land of the Chevy Chase Land Company and the land belonging to the estate of John R. Morgan, deceased, said point being North 10° 34′ east five hundred and forty-two and four hundredths feet (542.04) from stone at the southwest corner of the land now owned by John R. Morgan, thence with said division line North 10° 34′ east 200 feet, thence east 101.72 feet, thence south 10° 34′ west 200 feet, thence west 101.72 feet to the beginning containing 20000 square feet more or less, together with the improvements, rights, privileges and appurtenances to the same belonging,

In testimony whereof, the parties of the first part, have hereunto set their hands and seals on the day and year first above written.

JOHN R. MORGAN. [SEAL.]
LENA MORGAN. [SEAL.]
AGNES V. HOPPE. [SEAL.]
HELEN E. MORGAN. [SEAL.]
EDWARD F. MORGAN. [SEAL.]

Witness:
JOSEPH R. FAGUE.

I, Joseph R. Fague a notary public, in and for the District of Columbia, do hereby certify that John R. Morgan, Lena Morgan, Agnes V. Hoppe, Edward F. Morgan and Helen E. Morgan, parties to a certain deed bearing date on the 15th day of June 1908, and hereto annexed, personally appeared before me in said District, the said John R. Morgan, Lena Morgan, Agnes V. Hoppe, Edward F. Morgan and Helen E. Morgan, being personally well known to me as the persons who executed the said Deed, and acknowledged the same to be their act and deed.

Given under my hand and seal the 16th day of June, 1908.

[NOTARIAL SEAL.] JOSEPH R. FAGUE,
Notary Public, D. C.

21 EXHIBIT "E."

WASHINGTON, D. C., *March* 11, 1909.

Andrew Wilson and Noel W. Barksdale, Trustees in account with Noel W. Barksdale, Executor of the estate of Charles R. Morgan, deceased for the proceeds of sale of certain real estate known as part of Fletchall's Chance in the District of Columbia, under three certain deeds of trust, dated November 7, 1904, April 29, 1905, and March 15, 1905, and recorded respectively in Liber 2855 folio 96, Liber 2861 folio 62 and Liber 2905 folio 71 of the land records of the District of Columbia.

Sales Made February 20, 1909.

To proceeds of sale of the 20,000 square feet		$5700.00
Proceeds of sale of acreage property		13375.00
		$19075.00
By expenses of sale February 20, 1909:		
Advertising in Evening Star	$64.17	
Auctioneer	10.00	$74.17
Payment of note for	$500.00	
Interest at 6% from April 29, 1908	24.66	
Payment of note for	1000.00	
Interest at 6% from May 7, 1908	48.00	
Payment of note for	1500.00	
Interest at 6% from March 25, 1908	85.00	
Taxes to day of sale	275.17	$3432.83
Expenses of sale November 30, 1908:		
Trustees' commission	$1003.44	
Auctioneer	40.56	
Costs advanced	20.00	
Trustees' bond	90.00	
Advertising confirmation of sale	32.40	
Examiner taking testimony	10.00	
Notary fees in making deed	1.25	
Cut for advertisement	2.00	
Survey of property and plat	20.00	
Evening Star advertising	138.60	
Witness fees	2.50	
	$1370.75	
22 By reason of the sale *of the sale* of this property in conjunction with the property of John R. Morgan, who owned an undivided one half interest, John R. Morgan bore one half the expense of the sale of November 30, 1908	$685.38	$4192.38
		$14882.62

Received of Andrew Wilson and Noel W. Barksdale, Trustees $14882.62 as shown by the above account this 11th day of March, 1908.

NOEL W. BARKSDALE, *Executor.*

23 *Answer of Infant Defendant Helen Hoppe by Guardian ad Litem.*

Filed Mar. 25, 1909.

In the Supreme Court of the District of Columbia.

Equity. No. 28307.

NOEL W. BARKSDALE, Executor,
vs.
EDWARD F. MORGAN et al.

For answer to the bill of complaint filed in the above-entitled cause, the infant defendant, Helen Hoppe, answering by her guardian ad litem, Agnes M. Hoppe, respectfully states to the Court that she is an infant under the age of twenty-one years, to wit, of the age of eight years and that she can therefore neither admit or deny the matters and things stated in the bill of complaint, and she submits her rights in the premises to the protection of the court.

HELEN HOPPE,
By AGNES M. HOPPE,
Her Guardian ad Litem.

M. J. COLBERT, *Sol'r.*

I do solemnly swear that I have read answer by me subscribed on behalf of the infant defendant, Helen Hoppe, and know the contents thereof; that the matters and things stated on personal knowledge are true, and those stated on information and belief I believe to be true.

AGNES M. HOPPE.

Subscribed and sworn to before me this 26th day of March A. D., 1909.

[SEAL.]

LOUISE F. DYER,
Notary Public, D. C.

24 *Answer of Defendant Agnes M. Hoppe.*

Filed Mar. 26, 1909.

In the Supreme Court of the District of Columbia.

Equity. No. 28387.

NOEL W. BARKSDALE, Executor,
vs.
EDWARD F. MORGAN et al.

For answer to the Bill of Complaint filed in the above-entitled cause, the defendant Agnes M. Hoppe states that she is willing to

admit the matters of fact stated in the Bill of Complaint and she claims such interest in such matters and things as she is entitled to under the law.

AGNES M. HOPPE.

I do solemnly swear that I have read the foregoing answer signed by me and know the contents thereof; that the matters and things therein stated by me on personal knowledge are true, and the matters and things stated on information and belief I believe to be true.

AGNES M. HOPPE.

Subscribed and sworn to before me this 26th day of March, A. D., 1909.

[SEAL.]

LOUISE F. DYER,
Notary Public, D. C.

25 *Answer of Edward F. Morgan and Helen E. Morgan.*

Filed Mar. 29, 1909.

In the Supreme Court of the District of Columbia.

Equity. No. 28387.

NOEL W. BARKSDALE, Executor, &c.,
vs.
EDWARD F. MORGAN et al.

Now come Edward F. Morgan and Helen E. Morgan and for answer to the bill of complaint in the above-entitled cause, answering say:

That they admit the allegations of said bill as contained in all the paragraphs from one to thirteen and are willing that the full relief prayed for shall be granted.

EDWARD F. MORGAN,
HELEN E. MORGAN,
Defendants.

Edward F. Morgan and Helen E. Morgan on oath say that they have read the foregoing answer by them subscribed and know the contents thereof; that the statements therein made of their own knowledge are true and those made upon information and belief they believe to be true.

EDWARD F. MORGAN.
HELEN E. MORGAN.

Subscribed and sworn to before me this 29th day of March 1909.

J. R. YOUNG, *Cl'k,*
By F. E. CUNNINGHAM,
Ass't Cl'k.

26 *Answer of Defendant John R. Morgan.*

Filed Mar. 30, 1909.

In the Supreme Court of the District of Columbia.

Equity. No. 28387.

NOEL W. BARKSDALE, Executor of the Estate of Charles R. Morgan, Deceased,
vs.
EDWARD F. MORGAN et al.

Now comes the defendant John R. Morgan and answering the bill of complaint filed in this cause, states as follows:

He admits the allegations of the first, second, third, fourth, fifth, sixth, seventh, eighth, and ninth paragraphs of the bill.

10. Answering the tenth paragraph he states that he is advised by counsel and avers that under the will of the said Charles R. Morgan, Agnes V. Hoppe and himself were seized of a life estate only in the residue of the estate left by Charles R. Morgan as described in the third paragraph of the said will; but whether the said Edward F. Morgan and Helen E. Morgan take a fee simple estate in the real estate devised under the second paragraph of the said will or a life estate only with the remainder over to vest as provided in the third paragraph of the will, he is not advised and submits that this section of the will as to what title or interest the said Edward F. Morgan and Helen E. Morgan take in the real estate therein mentioned should be submitted for the determination of this court.

He admits the eleventh and twelfth paragraph- of the
27 bill.

13. Answering the thirteenth paragraph of the bill, he states that he is not advised as to what would be the final out come of litigation to sustain or break the will of the said Charles R. Morgan, but he is anxious and willing that subject to such construction of the will by the court as will determine the interests and estates of the various beneficiaries thereunder. That the compromise agreement be carried out.

Having fully answered the said bill of complaint he prays to be henceforth dismissed with the proper costs.

JOHN R. MORGAN.

ROBINSON WHITE,
Sol'r for Def't.

DISTRICT OF COLUMBIA, *ss:*

Before me, John L. Fletcher, a Notary Public in and for the said District of Columbia, personally appeared John R. Morgan, who being first duly sworn states that he has heard read the foregoing answer by him subscribed. That all matters therein stated on per-

sonal knowledge are true as stated and that all matters stated on information and belief he verily believes to be true.

JOHN R. MORGAN.

Subscribed and sworn to before me this 30th day of March 1909.

[SEAL.] JOHN L. FLETCHER,
Notary Public, D. C.

28 *Answer of Infant Defendant, Charles G. Morgan, by Guardian ad Litem.*

Filed Mar. 30, 1909.

In the Supreme Court of the District of Columbia.

Equity. No. 28387.

NOEL W. BARKSDALE, Executor of the Estate of Charles R. Morgan, Deceased,
vs.
EDWARD F. MORGAN et al.

Now comes John R. Morgan, guardian ad litem of Charles G. Morgan, one of the infant defendants named in said cause and answering the said bill of complaint states as follows:

He neither admits or denies the allegations contained in the said bill of complaint and submits the rights and interests of the said infant defendant to the protection of this court.

JOHN R. MORGAN.

ROBINSON WHITE,
Sol'r for Def't.

DISTRICT OF COLUMBIA, *ss:*

Before me, John F. Fletcher, a Notary Public in and for the said District of Columbia, personally appeared John R. Morgan, guardian ad litem of Charles R. Morgan, who being first duly sworn states that he has heard read the foregoing answer by him subscribed. That all matters set forth in the above answer are true as stated.

JOHN R. MORGAN.

29 Subscribed and sworn to before me this 30th day of March 1909.

[SEAL.] JOHN L. FLETCHER,
Notary Public, D. C.

Answer of Marie M. L. Morgan, Charles H. Morgan, and Malcolm A. Morgan, Infant Defendants, by Their Guardian ad Litem, Charles C. Carlin.

Filed Mar. 31, 1909.

In the Supreme Court of the District of Columbia.

Equity. No. 28387.

NOEL W. BARKSDALE, Executor,
vs.
EDWARD F. MORGAN et al.

Respondents, by their guardian ad litem, answer and say:

That all the allegations of the bill are admitted. Respondents reserve the right, however, to file a cross bill in the cause, setting up a claim to a provision made for their maintenance under a decree entered by this Honorable Court, in another proceeding of the divorce between the respondents' father and mother.

C. C. CARLIN,
Guardian ad Litem for Marie M. L. Morgan, Charles H. Morgan, and Malcolm A. Morgan.

J. K. M. NORTON,
Solicitor for Respondents.

30 Charles C. Carlin on oath says that he has read the foregoing answer by him subscribed as Guardian ad litem, and knows the contents thereof; that the statements therein made to his personal knowledge are true, and those made upon information and belief he believes to be true.

C. C. CARLIN.

Subscribed and sworn to before me this 30th day of March 1909. My commission as Notary expires July 26, 1912.

[SEAL.] HOWARD W. SMITH,
Notary Public.

Complainant's Replication.

Filed Apr. 1, 1909.

In the Supreme Court of the District of Columbia.

Equity. No. 28387.

NOEL W. BARKSDALE, Executor, &c.,
vs.
EDWARD F. MORGAN et al.

The complainant hereby joins issue with the defendants and the guardians *ad litem* upon their answers filed in this cause.

NOEL W. BARKSDALE,
Complainant.

WILSON & BARKSDALE,
Solicitors for Complainant.

31 *Deposition for Complainant.*

Filed Apr. 1, 1909.

In the Supreme Court of the District of Columbia.

Equity. No. 28387.

NOEL W. BARKSDALE, Executor of the Estate of Charles R. Morgan, Deceased,
vs.
EDWARD F. MORGAN et al.

Be it remembered That at an examination of witnesses begun and held this first day of April, 1909 pursuant to agreement, personally appeared before me, Albert Harper, an Examiner in Chancery of the Supreme Court of the District of Columbia, the within named Noel W. Barksdale, who, producing himself as a witness of lawful age for and on behalf of himself as the complainant in the above-entitled cause, and being first duly sworn and cautioned to tell the truth, the whole truth, and nothing but the truth, touching the matters at issue in the above-entitled cause, did depose and say as follows:

APRIL 1, 1909—THURSDAY, 2 o'clock p. m.

Met pursuant to agreement.

Appearances: Edward F. Morgan and Helen E. Morgan, co-defendants, J. K. M. Norton, Esq., Solicitor for Charles C. Carlin, as guardian ad litem for the infant defendants, Marie M. L. Morgan, Charles H. Morgan, and Malcolm A. Morgan; also Michael J. Colbert, Esq., Solicitor for the defendant, Agnes M. Hoppe,
32 for herself and as guardian for the infant defendant, Helen Hoppe; also Robinson White, Esq., Sol-citor for the defendant, John R. Morgan, for himself and as guardian ad litem for the infant defendant Charles G. Morgan; also the Examiner, Albert Harper, Esq., and also the complainant Executor—

NOEL W. BARKSDALE, who, being produced as a witness of lawful age for and on behalf of himself as the complainant Executor, and being first duly sworn, deposes and says;

I am an attorney by profession, a member of the law firm of Wilson & Barksdale, and the complainant Executor in this cause.

The statements in the bill of complaint filed in this cause are true to the best of my knowledge, information and belief; and the residences, citizenship and kinship as set forth in paragraph — of the bill of complaint are true.

Charles R. Morgan was for a long time a resident in the District of Columbia he died the 24th of October, 1905, leaving a will dated February 23, 1905, and that will was afterwards filed for probate and record. A caveat was filed to that will by the children of Charled R. Morgan, and, upon issues being framed, trial was had by a jury, and the will was set aside by the jury. The caveatees appealed to

the Court of Appeals, and that verdict was set aside and a new trial was granted.

After the case came back, the parties all entered into an arrangement of compromise, rather than take chances of a new trial, to incur the expenses of cost, and the uncertainty of the result;
33 and a copy of that compromise agreement is filed as Exhibit B to the Bill of Complaint in this cause.

It was the intention of all parties connected with this compromise agreement to give to the children of Charles R. Morgan absolutely one half interest in the estate; but, upon the title to the property being investigated by a title company, the attention of the attorneys for the parties was called to the fact, that under the will no such division as that could be made on account of paragraph three of the will, which left it to the three adults mentioned therein, and to the survivor or survivors, and the children of the survivor and the title company was of the opinion, that the adults took only a life estate, and that, therefore, they could not convey, according to the terms of their agreement, one-half interest in the estate of Charles R. Morgan.

Thereupon it was further agreed, by the parties concerned that it was to the best interests of all that this compromise agreement should be carried out, according to the intention of all the parties concerned, and give to the children of Charles R. Morgan one-half interest in that property the other parties interested accordingly to take their interest subject to the terms of the will; and it was agreed that the property should be sold by the trustees, who were trustees under certain encumbrances to secure notes to sell the property, at public sale, and, after the payment of all expenses, to turn over the proceeds of sale to the Executor of the will, and that he should file a bill in this court, asking the Court to construe the will and direct him what distribution to make of the proceeds of sale. This agreement was carried out; and, accordingly, this bill was filed by the Executor for that purpose.

34 Exhibit A, filed with the bill of complaint, is a copy of the will of Charles R. Morgan. Exhibit C is a certified copy of the will, and copy of the letters testamentary issued to the Executor. Exhibit D is a copy of the deed made by John R. Morgan, Lena Morgan, Agnes V. Hoppe, Helen E. Morgan and Edward F. Morgan, in order to carry out the compromise agreement. And Exhibit E is a statement of the account of Andrew Wilson and Noel W. Barksdale, Trustees, showing the funds received by them from a sale of the twenty thousand square feet, and the acreage property, and the amount of money that they turned over to the Executor after the payment of all expenses. These Exhibits A, B, C, D, and E, filed with the bill of complaint in this cause, are here given in evidence.

As the Executor having had to do with the Morgan Estate for some time, I am perfectly satisfied that the compromise agreement should be carried out in order to protect and conserve the interest of all parties concerned, and that the interests of all the parties would be served by carrying out the wishes of all the parties con-

cerned, as shown by the compromise agreement, and their consent as shown by their answers filed to the bill of complaint in this cause.

NOEL W. BARKSDALE.

Subscribed and sworn to before me this 1st day of April, 1909.

ALBERT HARPER,
Examiner.

Mr. COLBERT: As solicitor for the defendant, Agnes M. Hoppe, for herself and as guardian for her infant child, Helen
35 Hoppe, I will state here that I fully agree in what Mr. Barksdale has just testified to, and that I entirely agree that this compromise agreement should be carried out, and that I think it would be to the interest of Agnes M. Hoppe, and her infant child, Helen Hoppe, that it should be carried out as indicated.

Mr. NORTON: As solicitor for the defendant, Charles C. Carlin, guardian ad litem for the infant defendants, Marie M. L. Morgan, Charles H. Morgan, and Malcolm A. Morgan, I will say that I concur in and make the same statement just made by Mr. Colbert.

Mr. WHITE: As solicitor for the defendant, John R. Morgan, for himself and as guardian ad litem for the infant defendant, Charles G. Morgan, I will state that, so far as the compromise agreement provides for giving the children of Charles R. Morgan, their half of the proceeds of this estate, the said defendant John R. Morgan, for himself and as guardian ad litem for said infant defendant, Charles G. Morgan is entirely agreeable to, and, in fact, wishes this agreement to be carried out, as provided in Exhibits B filed with the bill of complaint in this cause. As to that part of the compromise agreement, wherein Edward F. Morgan and Helen E. Morgan are to take one-half interest in the twenty thousand square feet, absolutely, it is the purpose and intention of the said John R. Morgan that their interest in this land, or in the proceeds of the sale thereof, be as the Court may determine upon its construction of the will. In all other respects I concur in the statements made by Mr. Barksdale in his testimony, as to the proper distribution of the proceeds of the sale of the property.

36 Mr. BARKSDALE: Testimony on behalf of the defendant is here closed.

ALBERT HARPER,
Examiner.

Final Decree.

Filed Apr. 15, 1909.

In the Supreme Court of the District of Columbia.

Equity. No. 28387.

NOEL W. BARKSDALE, Executor, etc.,
vs.
EDWARD F. MORGAN et al.

This cause coming on to be heard on the original bill, the answers of the defendants, the answers of the infants by their guardians *ad litem,* and the testimony in the cause, and the same having been argued by counsel and duly considered by the Court, it is this 15th day of April, 1909, ordered as follows:

1. That the compromise agreement filed as "Exhibit B" to the Bill of Complaint is ratified and confirmed and is hereby directed to be carried out in accordance with the intention of the parties thereto as set out in the bill of complaint, the answers and the testimony.

2. The will of Charles R. Morgan is hereby construed to convey to Edward F. Morgan and Helen E. Morgan a fee simple estate in and to said 20,000 square feet of ground as described in said will.

3. That paragraph three is hereby construed to convey the residue of the estate unto Edward F. Morgan, John R. Morgan and Agnes V. Hoppe for life, with remainder over to the survivors and survivor for life, and the remainder in fee to the children of the last survivor.

37 4. That the incumbrances and expenses of the trustees' sale of said property as shown by "Exhibit E," and all debts of the estate, and all costs and expenses of administration, shall be charged against the estate, before division thereof.

5. That the Executor will distribute the proceeds of sale of the aforesaid 20,000 square feet, after deducting therefrom a proper proportional part of the said debts, costs and expenses, by payment of one half unto Edward F. Morgan and Helen E. Morgan, absolutely, and the other one-half thereof unto the guardian of the children of Charles R. Morgan absolutely.

6. That the Executor will distribute the residue of the funds in his hands by payment of one half unto the guardian of the children of Charles R. Morgan, absolutely and the other one half unto a trustee or trustees, to be hereafter designated, and which fund shall be invested for the benefit of Edward F. Morgan, John R. Morgan, and Agnes V. Hoppe, during their lives, and the life of the survivors and survivor, and upon the death of the last survivor the whole fund to be paid to his or her children, as provided in paragraph three of the aforesaid will.

7. That the cause is hereby referred to the Auditor to advertise

for creditors and state the executor's account in accordance with the provisions of this final decree.

JOB BARNARD, *Justice.*

Auditor's Report.

Filed Jul- 2, 1909.

In the Supreme Court of the District of Columbia.

Equity. No. 28387.

NOEL W. BARKSDALE, Executor, etc.,
vs.
EDWARD F. MORGAN et al.

38 This cause is referred to me to state the account of the executors in accordance with the provisions of the decree and after notice to creditors to present their claims and proofs. After due notice I proceeded with the reference.

Charles B. Morgan, resident of the District of Columbia, died therein on the 24th day of October 1905, leaving a last will and testament which was filed in the office of the register of wills with petition praying its admission to probate and record. Thereafter a caveat was filed by a guardian ad litem in behalf of certain infants, and issues being framed the caveat was tried by the Court and jury, the result being the verdict finding that the testator was not of sound and disposive mind, and the Court made a decree setting the will aside. An appeal was taken by the executor and after hearing in the Court of Appeals, a judgment was rendered in which the decree of the Court of Appeals was reversed and a new trial ordered. Thereafter, the parties, including the guardian ad litem entered into an agreement compromising the issues, a copy of the said agreement made on June 9, 1908 being contained in Exhibit B to the bill of complaint in this cause. Due conveyances were made to effect the purpose of the compromise agreement as set forth in the original bill herein.

A portion of the estate left by the testator consisted of two parcels of real estate, one described as 20,000 square feet of property improved by the residence occupied by the testator during his life time and the other including the remainder of certain real estate in which the testator had an interest.

Pursuant to agreement subsequently made, the said real
39 estate was sold by proceedings in Equity Cause 27,880 and after payment of expenses of such sales, an- indebtedness secured by deeds of trust, the remainder of the proceeds of such sales was delivered to the complainant executor.

The original bill in this cause was filed by the executor setting forth the history of the matter and presenting to the Court the agreement of compromise and the proceedings in the said Equity Cause No. 27,880 and prayed the Court to ratify and approve the

said agreement and that the complainant might be required to bring the proceeding of the estate into Court to be settled under the Court's direction, also for the appointment of trustees to invest one-half of the residue of the estate for the benefit of the remaindermen.

On the 15th day of April, 1909, the Court made its decree herein ratifying and confirming the compromise agreement, construing the will of the testator as to convey to Edward F. Morgan and Helen E. Morgan a fee simple estate in the said 20,000 square feet of ground and premises and to convey the residue of the estate unto Edward F. Morgan, John R. Morgan and Agnes B. Hoppe for life with the remainder over to the survivors and survivor for life and the remainder in fee to the children of the last survivor.

The decree provided further that the incumbrances and expenses of the trustees' sale of said property as shown by Exhibit E and all debts of the estate and all costs and expenses of administration be charged against the estate before division thereof.

40 The executor has presented an account of his receipts and disbursements from which account and proof in the case I have stated his account in Schedule A herewith. The disbursements include payment of a number of notes of the testator with interest to the date of payments and an allowance to C. C. Carlin re-imbursing him for advances made to avoid a threatened foreclosure of trusts on the real estate herein described.

The claim of Andrew A. Wilson, Esq. for allowance of a fee for services rendered in the proceedings upon caveat to the will is presented in connection with the order of reference, and testimony was taken herein of the said counsel detailing the character and extent of said services, together with the evidence of a number of members of the bar as to the value of such services. An important element of the matter in this connection is the fact of a decree for judgment adverse to the will in the original trial Court which imposed upon counsel advising the executor the duty of determining the propriety and advantage or otherwise of an appeal to the Court of Appeals and the result of such an Appeal which resulted in reversing the judgment of the Court below.

Upon the record and proof submitted in this reference both as to services and value, I have no hesitancy in reporting in the accounts herewith an allowance of counsel fees to Mr. Wilson in the sum of two thousand dollars ($2,000).

In view of the responsibility and services imposed upon the executor in his dealings with the estate and services rendered in filing and prosecution of the original bill in this cause, I have reported an allowance of commission on the entire estate coming into his hands of five per cent.

41 I have then taken the respective proceeds of sale of the two parcels of real estate charging each with its proper proportion of costs, expenses and allowances, and stating distribution of the net remainders in accordance with the direction of the final decree in the case.

JAS. G. PAYNE, *Auditor.*

In the Supreme Court of the District of Columbia.

Equity. No. 28387.

NOEL W. BARKSDALE, Executor,
vs.
EDWARD F. MORGAN et al.

TUESDAY, *May* 25, 1909—1:30 p. m.

Hearing pursuant to notice.

Present: Noel W. Barksdale for Executor, Mr. Robinson White for J. R. Morgan, Mr. Henry E. Davis and J. K. M. Norton for —.

ANDREW WILSON being duly sworn testified as follows:

By Mr. BARKSDALE:

Q. You are an attorney and member of the bar of the
42 District of Columbia? A. Yes.

Q. State whether or not you were employed by the executor of the will of Charles R. Morgan to defend the attack made upon that will, and if so, under what circumstances and what did you do? A. When caveat was filed in the matter of the estate of Charles R. Morgan, Probate 13,262, authority was gotten by the Executors named in the will to employ counsel, and he then requested me in connection with Mr. E. H. Thomas to represent him in the will contest. In fact he said, "I want to employ you and Mr. Thomas and I do employ you and Mr. Thomas to attend to this." That was about December 1905, as I recall, and I then filed an answer to the caveat for the executor on or about December, 13, 1905.

We had issues framed and secured witnesses and prepared the case for trial. A great deal of time was spent in interviewing witnesses and looking into the testator's past history as he was at one time an inmate of St. Elizabeth's and his mental capacity was challenged in the caveat.

There were a number of other heirs as well. After several postponements the case came on for trial. The heirs attacking the will were represented by Mr. H. E. Davis and Judge J. K. M. Norton. Twenty witnesses were produced on behalf of the caveators and forty-four on behalf of the caveatees, sixty-four in all. The trial lasted from 10:00 on Monday morning to about 1:30 on Saturday afternoon, several days of that time the Court sitting until about 4:00 or 4:30. The result was a verdict against the will.

A motion for new trial was made which I argued at length, the motion was overruled. That was held over for a considerable
length of time, and the case was taken to the Court of
43 Appeals.

The transcript of record of which I have a copy here comprises sixty-five pages, fifty-three of which is the bill of exception.

On behalf of the executor I prepared and filed a brief in the Court of Appeals containing 47 pages to which Mr. Colbert's name is attached, but he was in Europe at the time, and had not taken active part in the preparation of the brief. The case was argued in the Court of Appeals and before its decision by Mr. Justice McComas Mr. Davis insisted upon re-argument of the case. We prepared the case for re-argument. The Court of Appeals reversed the decision of the lower Court and awarded a new trial. I think that was Feb. 12, 1908.

Negotiations were entered upon to settle the case with the caveators on June 9, 1908. A settlement was reached whereby the will was submitted to Probate and record, and after that the executor qualified to take out letters *of* testamentary. By the terms of settlement the caveators took one-half after the payment of all debts, and the other one-half went according to the provisions of the will.

Mr. Ed. F. Morgan had some property out of this original estate of his father by the terms of the compromise he was to convey one-half of the interest by deed from the testator.

Mr. DAVIS: I think I will have to interpose objection upon the ground that the papers are all in writing and of record and besides that, nothing done in relation to that settlement can be considered as having been done in defense of the will.

44 The value of the property including the real estate and personal property totals $19,229. The real estate was incumbered and sold under certain trust and the executor realized cash $14,282.67—$154.55 personal property, making the total in the hands of the executor $15,036.57. The debts of the estate did not exceed $700 if we exclude a claim of Mr. Carlin for $629.99 and interest from June 1908—$1,250 that is owing to Mr. Ed. Morgan and the cost of the executor in defending the will which amount is about $640.35.

No compensation has been allowed or paid to the attorneys for the executor for his service.

Q. In your opinion what would be a fair and reasonable fee for the services performed? A. Considering the circumstances I think a fair and moderate fee for the services performed would be $2,000.

Cross-examination by Judge NORTON:

Q. You mention Mr. Carlin's claim—— A. That will have to — paid of course.

Q. At the time of the execution of the agreement by which the infant children of Charles R. Morgan were to receive one-half of the estate under the compromise, was anything said by you to the counsel for these children at that time that they would be expected to pay part of the fee for defending the will? A. I do not recall anything being said by me about that at that time. We had been talking about the allowance of fee for the executor and the order was executed authorizing the employment of counsel, and we assumed a fee would be paid and allowed by the Court.

45 Judge NORTON being duly sworn testified as follows:

Q. You are a practising lawyer and a member of the bar of the District of Columbia? A. Yes, sir.

Q. You represented the caveators in this case to the lower Court and to the Court of Appeals? A. Yes, with Mr. Davis.

Q. You are familiar with the amount of services performed by the attorney for the executors in this case? A. I don't know that I am. I only saw the services performed in the actual trial.

Q. Taking into consideration what you know of the services performed in this case, would you or would you not think $2,000 was a reasonable fee for those services.

Judge Norton withdraws from the stand.

Mr. BIRNEY testifies as follows:

By Mr. BARKSDALE:

Q. You are a member of the bar of the District of Columbia? A. Yes sir.

Q. You heard Mr. Wilson's statement as to the services in this case. In your opinion what would be a reasonable fee for the said services? A. I think $2,000 the amount named would be a most modest fee, and even more might very well be claimed as a reasonable fee.

BENJAMIN F. LEIGHTON testifies as follows:

I concur. I think in view of the statement of Mr. Wilson
46 and my examination of the record and the proofs in the case that the claim is a proper one, assuming that it is for all of the attorneys for the executor.

Mr. JOHNSON testifies as follows:

From the statement of the services rendered which is the same as Mr. Wilson had stated and my examination of the records and considering the amount of the estate involved, I am of the same opinion. The case appears to have been one that required considerable labor and preparation, and it seems to me that a fee of $2,000 would be fair and just compensation.

Mr. EARNEST testifies as follows:

I can only repeat what has already been said by the others. The statement was also submitted to me and I have gone over it very carefully and I can only add, taking into consideration the time of the trial, the witnesses examined, and the work done, that $2,000 is a very fair and reasonable fee.

Mr. ROBINSON WHITE testifies as follows:

I am familiar with the proceedings, especially the latter part and will say that the proceeding from its inception was one requiring a great amount of work, and I think a fee of $2,000 entirely reasonable. I desire to say further that as counsel for Mr. J. R. Morgan the compromise was effected and I understood of course that the counsel fee would be allowed to Mr. Wilson in the will contest.

47 Cross-examination by Judge NORTON:

You never suggested to Mr. Davis or myself that any fee would be expected from the half we compromised for? A. Well, I never suggested it; as a matter of fact I did not think such a suggestion was necessary.

HENRY E. DAVIS testifies as follows:

By Judge NORTON:

Q. You are counsel for the infant children of Charles R. Morgan in the contest over his will? A. Yes, sir.

Q. At the time when the compromise agreement was entered into which is filed as an Exhibit marked B with the bill of complaint, was any suggestion made that there would be any deductions on account of counsel fees or otherwise in the half that the children were to receive from the estate? A. The compromise agreement was effected through the efforts of Judge Norton, but I was consulted by him from time to time as to the terms and conditions of the compromise and it was not finally agreed to until after various conferences between him and me. I did not know that it was in contemplation to charge a fee for the defense of the will and assented to and advised the compromise on the supposition that the respondents of the estate would bear respectively whatever counsel fees would be charged. Had that been brought to my attention I should surely have covered it by a provision in the settlement.

Cross-examination by Mr. BARKSDALE:

Q. You had nothing to do with the settlements by the at-
48 torney for the executor? A. No nothing.

Q. Were you or were you not familiar with an order passed by the Probate Court asking the executor to employ counsel and defend the will? A. I knew that such an order had been made and assumed it had become effective. I wish to say that it is very distasteful to me to appear in the attitude of saying anything by way of objection to the allowance of this fee, and I am saying what I have said only through a sense of duty to these children whose interests have been in the hands of Judge Norton and myself.

Judge NORTON: My statement is the same as that of Mr. Davis with the exception that I more directly had the matter of the actual effecting of the compromise. There was certainly no suggestion made to me during the negotiations leading to the thought of a fee being charged.

Adjourned.

49 SCHEDULE A.

Account of Noel W. Barksdale, Executor of Charles R. Morgan, Deceased.

DR.

To Money on deposit		29.44
" Sale of Gray horse		50.00
" Sale of bay mare		75.00
" Sale of farming implements		30.00
" Sale of household effects		23.17
" Proceeds of sale of real estate		14,882.67
" Taxes paid		33.95
" Sale of jewelry		10.00
		15,134.23

CR.

By Repair of watch	1.75	
" Evening Star, Auditor's notice	4.20	

50 CR.

By Paid John E. Morrow, blacksmith	8.00	
" Paid Walter A. Wells, professional services	21.00	
" Paid Wm. F. Downey, Carriages	3.00	
" Paid Joseph Gawler, funeral expenses	164.25	
" Paid Charles Lockhead, plumbing	12.30	
" Hanna & Budlong, stenographic work	313.00	
" E. B. Behrend, professional services	10.45	
" Edward F. Morgan, professional services	41.10	
" Edward F. Morgan, carriage at funeral	4.00	
" Edward F. Morgan, opening grave	2.00	
" Deposit for costs	15.00	
" Marshal fees	20.00	

51 CR. 15,134.23

By Paid McGill & Wallace, briefs	51.50	
" Moving household effects	4.00	
" Executor's bond	5.00	
" Register of wills costs	53.98	
" Costs in Court of Appeals	97.90	
" Docket fees paid	20.00	
" C. C. Carlin, return of advances	659.07	
" Note and interest of John L. Johnson	76.92	
" Law Reporter, Auditor's notice	4.32	
" Note and interest of Edw. F. Morgan	1,244.50	
" Witness fees	52.50	
" Note and interest of Adele B. Harry	252.20	

" Note of Mary E. French.....	128.17	
" D. R. Stanbury, repairing.....	23.00	
	3,293.91	
52		15,134.23
		3,293.91
		11,840.32
Allowance to Andrew A. Wilson as counsel fees in proceeding upon caveat to will..	2,000.00	
Commission to executor.....	756.71	
Auditor's fees	90.00	
Costs of suit.....	46.05	
		2,892.76
		8,947.56

—— ——, *Auditor.*

53 Distribution of $8947.56 is directed as follows:

Proceeds of sale of 20,000 square feet after deducting therefrom its proper proportional part of debts, costs and expenses, the same being .298%, one half to Edward F. and Helen E. Morgan....	$1500.68
One half to guardian of children of Charles R. Morgan	1500.68
The residue of the funds in Executor's hand one half to the guardian of children of Charles R. Morgan..	2973.10
One half to the trustee of Edward F. Morgan, John R. Morgan and Agnes V. Hoppe.....	2973.10
	$8947.56

54 *Exception of Defendants to Report of Auditor.*

Filed Jul- 16, 1909.

In the Supreme Court of the District of Columbia.

Equity. No. 28387.

NOEL W. BARKSDALE, Executor, Complainant,
against
EDWARD F. MORGAN and Others, Defendants.

Come now the above named defendants by their guardian ad litem and solicitors, and except to the said report so far as the same allows to Andrew A. Wilson the sum of Two Thousand Dollars as counsel fees in the proceedings upon the caveat to the will of Charles R. Morgan, upon the following grounds:

1. The said allowance is contrary to the agreement of compromise of date June 9, 1908, upon which the bill of complaint was based and filed.

2. By the second provision of the said agreement of compromise, it was, and is, provided as follows:

"The estate of Charles R. Morgan after the payment of all debts, shall be equally divided in value, one-half to be the property of the children of Charles R. Morgan as of the date of the death of Charles R. Morgan, and the other half to be the property of the devisees under the will of Charles R. Morgan. A deed to be made to said children for said one-half. The sum of One Thousand Dollars to be considered as a debt due by the estate of Charles R. Mor-
55 gan to Edward F. Morgan, with interest thereon from the date of note held by him."

As in and by the said provision appears, it was the contemplation and intention of the parties to the said agreement that the only charges by which the said estate of Charles R. Morgan was to be reduced were the debts of the said Charles R. Morgan as existing at the time of his death, including the debt of One Thousand Dollars to the said Edward F. Morgan, which, prior to the making of the said agreement, was in dispute.

3. The supposed services of the said Wilson as counsel in the proceedings upon the caveat to the will of the said Charles R. Morgan were not in the interest, nor to the advantage of the exceptants, but were adverse to their interests; and it is contrary to equity and good conscience that the exceptants should be charged with anything on account of counsel fees for the said services.

4. It was the purpose and intent of the said agreement that the same should supersede, and the same in both law and fact did supersede, any and all claims of any of the parties in interest in, to, or upon the said estate of Charles R. Morgan, whereby the said agreement became and is the exclusive measure of the rights of said parties in the premises.

5. It was not the intention, contemplation or expectation of any of the parties to the said agreement that there should be any allowance to counsel for any of the said parties on account of any proceedings having reference to the admission of the will of the
56 said Charles R. Morgan to probate and record, and the allowance of any fee to any counsel of any of the said parties in respect thereto is contrary to the true intent, meaning and contemplation of the said agreement.

6. On its face and according to its true intent, meaning and contemplation, the said agreement deals with, and undertakes to dispose of and distribute, the estate of the said Charles R. Morgan as it stood at the time of his death, and without reference to any other or subsequent liabilities that might or could be asserted in respect of the attempted administration of the said estate as though the last will and testament of the said Charles R. Morgan were a valid and subsisting instrument.

7. The said allowance to the said Wilson is in contravention of, and contrary to, the terms, provisions, intent, meaning and contem-

plation of the said agreement, in that it reduces the share or interest of the exceptants in the estate of the said Charles R. Morgan by the amount of one-half of the said allowance, to-wit, the sum of One Thousand Dollars.

8. The said agreement of compromise was made and entered into by the parties thereto after the attempt to probate the will of the said Charles R. Morgan had been successfully resisted by the exceptants and after the rendition by the said Wilson of the supposed services for which the said allowance was made, and the said last will and testament was not admitted to probate and record as the result of the said services but solely because of, and through the said agreement of compromise.

57 9. Under the circumstances of the case, the allowance of the said sum, or of any sum, for counsel fees in the premises is inequitable, unjust to the exceptants, and without warrant or support in either law or fact.

J. K. M. NORTON,
HENRY E. DAVIS,
Solicitors for Exceptants and Guardian Ad Litem.

Decree Confirming in Part and Modifying Auditor's Report.

Filed Oct. 11, 1909.

In the Supreme Court of the District of Columbia.

Equity. No. 28387.

NOEL W. BARKSDALE, Executor, Complainant,
against
EDWARD F. MORGAN and Others, Defendants.

This cause having come on for consideration by the Court upon the report of the Auditor filed herein on the second day of July A. D., 1909, and the exception of the defendants, Marie M. C. Morgan, Charles H. Morgan and Malcolm A. Morgan, to the allowance by the said Auditor to Andrew A. Wilson of two thousand dollars as counsel fees in the proceedings upon the caveat to the will of Charles

58 R. Morgan, deceased, and having been argued by counsel and considered by the Court, It is, this 11th day of October A. D., 1909, adjudged, ordered and decreed that the said exception be, and the same hereby is sustained, and that in all other particulars the said report be, and the same hereby is, ratified and confirmed.

And from this decree the complainant in open Court prays an Appeal to the Court of Appeals of the District of Columbia, and the penalty of the bond on such appeal is hereby fixed at the sum of One (1) hundred dollars, with leave to the complainant to deposit in the registry of the court in lieu of such bond, the sum of fifty (50) dollars.

JOB BARNARD, *Justice.*

Memorandum.

October 11, 1909.—$50 deposited by N. W. Barksdale Ex'r in lieu appeal bond.

59 *Designation of Record on Appeal.*

Filed Oct. 11, 1909.

In the Supreme Court of the District of Columbia.

Equity. No. 28387.

NOEL W. BARKSDALE, Executor, Complainant,
against
EDWARD F. MORGAN and Others, Defendants.

The Clerk in making up the transcript for the Court of Appeals in the above entitled cause will include the following parts of the record:

The Original Bill and Exhibits.
The answers of defendants and replication.
The testimony taken and filed.
The final decree.
The Auditor's report, schedules and testimony.
Order directing Executor to employ counsel.
Exception filed thereto.
Order sustaining exception.
Memo. Bond on Appeal.
This designation.

WILSON & BARKSDALE,
Attorneys for Complainant.

60 Supreme Court of the District of Columbia.

UNITED STATES OF AMERICA,
District of Columbia, ss:

I, John R. Young, Clerk of the Supreme Court of the District of Columbia, hereby certify the foregoing pages numbered from 1 to 59, both inclusive, to be a true and correct transcript of the record according to directions of counsel herein filed, copy of which is made part of this transcript, in cause No. 28387 in Equity, wherein Noel W. Barksdale, Executor, etc., is Complainant and Edward F. Morgan, et als. are Defendants, as the same remains upon the files and of record in said Court.

In testimony whereof, I hereunto subscribe my name and affix the seal of said Court, at the City of Washington, in said District, this 3rd day of November, A. D. 1909.

[Seal Supreme Court of the District of Columbia.]

JOHN R. YOUNG, *Clerk.*

Endorsed on cover: District of Columbia Supreme Court. No. 2084. Noel W. Barksdale, Executor &c., appellant, vs. Edward F. Morgan et al. Court of Appeals, District of Columbia. Filed Nov. 5, 1909. Henry W. Hodges, Clerk.

Court of Appeals, District of Columbia

NOEL W. BARKSDALE, *Executor*,
vs.
EDWARD F. MORGAN ET AL.
} No. 2084.

BRIEF FOR APPELLANT

NOEL W. BARKSDALE,
Attorney for Appellant.

WILKENS, 11TH & E

Court of Appeals, District of Columbia

NOEL W. BARKSDALE, *Executor,*
vs.
EDWARD F. MORGAN ET. AL.
} No. 2084.

This is an appeal from a final decree of the equity court below refusing an executor an allowance for attorney's fee in a successful contest over a will.

STATEMENT OF FACTS.

Charles R. Morgan died on the 24th day of October, 1905, leaving a last will and testament dated February 23, 1905, wherein he disinherited his infant children and disposed of his property to his brothers and sister. He nominated the appellant as his executor (R. 6), who duly offered the will for probate and record (R. 2). The children of said Morgan, by their guardian *ad litem,* filed a caveat to said will (R. 2). The executor filed a petition asking leave of the Probate Court to employ counsel and to incur the necessary expenses to defend the will, and the Probate Court on that petition passed the following order:

> "This cause coming on to be heard on the petition of Noel W. Barksdale this day filed, and the same having been duly considered by the court, it is this 19th day of April, 1906, ordered that the said Noel W. Barksdale be, and he is hereby, authorized to employ counsel to defend the contest over the will of the said Charles R. Morgan, and to incur such expenses in said defense as may be necessary, the fees of said counsel and the said expenses to be paid out of the said estate."

On this authority of the court, the executor in good faith employed a member of the bar, to represent him in the will contest. The executor's counsel thereupon took active charge of the litigation and continued his services to the Executor for over three years until the will was finally admitted to probate and record. Four issues were framed, a trial had before a jury lasting six days, and a verdict against the will was returned on three issues. Counsel for the executor noted an appeal and brought the case to this court, where the lower court was reversed and a new trial granted. (Morgan vs. Morgan, 30 App. D. C., 436.)

Subsequently, rather than incur the costs and expenses of another trial, the legatees and devisees under the will and the representatives of the children of Charles R. Morgan entered into a compromise agreement (R. 5), under the terms of which it was agreed that the will should be admitted to probate and record, and the estate, after the payment of all debts, should be equally divided, one-half to be the property of the children of Morgan as of the date of his death, and the other half to go to the legatees and devisees under the will (R. 5, 6). The executor was not a party to this agreement.

Pursuant to this agreement the issues were again submitted to a jury, the executor's counsel appearing for the executor, and the jury found in favor of the will on all the issues and accordingly the will was admitted to probate and record and letters testamentary were granted to appellant June 15, 1908 (R. 3, 6). In all these proceedings, counsel for executor conducted the litigation.

The executor proceeded to administer the estate and received assets amounting to $15,134.33. Some question having arisen as to the proper parties to share in the distribution and as to the rights of the parties to enter into the aforesaid compromise agreement, it was agreed between the parties to the agreement that the executor should file a bill

in equity bringing in all parties and ask the court to ratify the compromise agreement, direct the executor to make distribution under order of court, and settle the estate under the equity court's direction. Such a bill was then filed (R. 1-11). All parties were brought before the court, guardians *ad litem* were appointed and answered (R. 12-15). Testimony was taken and filed (R. 17-19) and the case came on for hearing, and after argument the court on April 15, 1909, passed the final decree (R. 20) ratifying the compromise agreement, construing the will, and directing the executor as to the distribution.

By paragraph 4 of said final decree, the court directed that "all debts of the estate, and all costs and expenses of administration, shall be charged against the estate, before division thereof," and by paragraph 7 referred the cause to the Auditor to advertise for creditors and state the executor's account in accordance with the provisions of the decree (R. 20).

The executor asked an allowance in his accounts for his attorney's fee. The Auditor took the testimony of six attorneys as to the amount to be allowed. In substance, the testimony is as follows:

> Mr. ANDREW WILSON testified that after the caveat was filed to the will, authority was gotten by the executor to employ counsel and that the executor employed him to defend the will. That he filed an answer to the caveat, and issues were framed. Much time was consumed in interviewing witnesses and looking into the history of testator, who was at one time an inmate of St. Elizabeth. That caveators produced 20 witnesses and caveatees produced 44. The trial lasted six days resulting in a verdict against the will. A motion for a new trial was made and argued at length, but was overruled. The case was appealed. The transcript of record covered 65 pages, of which 53 were the bill of exceptions. That he prepared and filed a brief of 47 pages. That the lower court was reversed. That no

compensation has been allowed or paid him for his services and in his opinion a fee of $2,000 would be reasonable (R. 23-24).

Mr. A. A. BIRNEY heard Mr. Wilson's statement and said he thought $2,000 was a most modest fee and even more might very well be claimed as a reasonable fee (R. 25).

Mr. B. F. LEIGHTON concurred in Mr. Birney's statement and said that in view of his examination of the record and the proofs, the claim was, in his opinion, a proper one (R. 25).

Mr. WILLIAM G. JOHNSON testified that from Mr. Wilson's statement and his examination of the record and the amount of the estate, he was of the same opinion as Mr. Birney and Mr. Leighton. That the case appeared to have been one that required considerable labor and preparation, and that a fee of $2,000 would be fair and just compensation (R. 25).

JOHN PAUL EARNEST testified that he agreed with what had been said by the others. That he had gone over the matter very carefully, and, taking into consideration the time of trial, witnesses examined, and work done, that he thought $2,000 a very fair and reasonable fee (R. 25).

ROBINSON WHITE testified that he was counsel for one of the devisees and that he was familiar with the proceeding from its inception and that it was one requiring a great amount of work, and he thought a fee of $2,000 entirely reasonable (R. 25).

Upon the record and proof of service and value, the Auditor in his report said he had no hesitancy in reporting an allowance to the executor of $2,000 as counsel fee (R. 22). The representatives of the children of Charles R. Morgan filed exceptions to the said allowance on the ground that it was not the intention of any parties to the agreement

that there should be any allowance to counsel for any of the parties on account of proceedings having reference to the admission of the will to probate and any allowance was contrary to the intent and meaning of said agreement (R. 28-30), although both attorneys for appellees testified that they knew of the existence of the executor's direction by the court to employ counsel, and assumed it had become effective (R. 26).

The cause then came on for hearing upon the exception to the Auditor's report and the court sustained the exception to the allowance of a counsel fee to the executor, and confirmed the report in all other particulars. From this order sustaining the exception, the appellant noted an appeal and has brought the case here for review.

ASSIGNMENT OF ERROR.

The court erred as follows:

1. In sustaining the exception to the allowance of $2,000 to the executor for counsel fee.

2. In refusing a reasonable sum to the executor for services of counsel secured by authority of court.

3. In disallowing a reasonable counsel fee incurred in good faith by the executor under authority of court and directed to be paid out of the estate.

POINTS AND AUTHORITIES.

A reasonable counsel fee to the executor is included in the "costs and expenses of administration."

The lower court by its final decree directed that "all costs and expenses of administration should be charged against the estate before division" (R. 20). It is generally understood that the expenses of administration include everything that is incident to the performance of the executor's

duty. 11 Ency. of Law, 1234; Sharp vs. Lush, 10 Ch. Div., 468. This court held (Tuohy vs. Hanlon, 18 App. D. C., 238) that the allowance of a fee to the counsel for an executor was a part of the reasonable cost of administration. There can be no question that such an allowance was contemplated by the lower court passing this final decree, because the same learned justice held (In re Pritchard, 30 Law. Rep., 11) that the reasonable costs of the trial in a will contest including an allowance for an executor's counsel must be regarded as an expense of administration.

The reasonableness of the allowance was not raised below by court or counsel for appellees.

The court did not disallow the fee because it considered it unreasonable, but because it thought no fee at all should be allowed, and it therefore sustained the exception to the allowance of any counsel fee (R. 30). Under Sec. 365 of the Code, the executor is entitled to an allowance for attorney's fees which the court may think proper to allow. The discretion allowed there to the court is not to be exercised in an arbitrary or capricious manner, but in a reasonable way, governed by general rules and principles, and if this discretion is abused, this court should correct the error. This court has held (Tuohy vs. Hanlon, 18 App. D. C., 228), and it is well settled law, that an executor is entitled to be allowed for counsel fees in his account, even though the will be overthrown. He is much more entitled where he has successfully resisted an assault upon the will as in the case at bar.

And the fact that the fee is not excessive is established by six witnesses, all of them attorneys, who testified as to the reasonableness of the fee (R. 23-26). Counsel for appellees raised no question as to the amount of the allowance before the Auditor, and it was not made the basis of a single one of appellees' nine exceptions to the Auditor's report (R. 28-30).

The executor's right to a reasonable counsel fee was established by the will, and recognized by the court, and he can not now be deprived of it.

Counsel for appellees testified they were familiar with the order passed by the Probate Court authorizing the executor to employ counsel to defend the will (R. 26). This was the first court that recognized the executor's right and approved the employment of counsel. The action of the executor in asking the court in advance for authority to employ counsel showed that the executor was acting in good faith. (Tuohy vs. Hanlon, 18 App. D. C., 225).

The equity court next recognized the executor's right. After the executor had employed counsel, and the counsel had rendered valuable services, the court approved the executor's action by providing in the final decree for the allowance to the executor of the costs and expenses of administration (R. 20), and the court actually passed the accounts where a part of the expenses incurred by the executor were allowed (R. 27-30).

But the real source of the executor's right to a reasonable counsel fee was the will itself. This court has held in Sinnott vs. Kenaday, 14 App. D. C., 1, that an executor derives his authority from the will, and not from the court wherein he becomes qualified to act, and that ruling was affirmed in Kenaday vs. Sinnott, 179 U. S., 615. And again this court said (Tuohy vs. Hanlon, 18 App. D. C., 225, 231) that it is settled law that the executor derives his interest in the estate entirely from the will and becomes vested with that interest from the moment of testator's death.

The interest of an executor in an estate is a substantial one. If he assumes the trust reposed, certain duties are at once imposed upon him to do whatever is proper to sustain the will. In order to perform these duties the testator has impliedly placed at the executor's disposal a reasonable part

of his estate for commissions, costs and expenses of administration. The reasonable costs of administration, which include counsel fees, and only such cost as is reasonable, is to be allowed to the executor out of the fund. Tuohy vs. Hanlon, 18 App. D. C., 234.

As the executor derives his authority and interest directly from the testator himself, he is entitled as a matter of right to reasonable counsel fees and the court can not by its order deprive the executor of them where he has acted in good faith. Even the learned court below upon another occasion was so impressed with this view of the law that he held (Estate of Pritchard, 30 Law Rep., 11) that it should be the policy of the law to grant an allowance of counsel fees under such circumstances as a matter of right, and that such a position was justified by principle and authority, as well as the requirements of public policy in administering the law of wills and decedent's estates.

In the case at bar, counsel was employed only after the court had said the case was a proper one for such employment and directed that his compensation should be paid out of the estate. The executor had a right to assume from this action of the court that a reasonable fee would be allowed him for his counsel and the counsel in rendering the services relied upon the order of the court and was justified in concluding that his fee would eventually be paid out of the estate as directed by the court's order.

In the estate of Pritchard, 30 Law Reporter, 11, the same learned court, that disallowed this fee, allowed an executor counsel fee in an unsuccessful will contest. The court said that an executor derived his authority and interest from the will and not the court and became vested with that interest from the moment of the testator's death (Tuohy vs. Hanlon, 18 App. D. C., 225), and having that authority and interest from the testator, the reasonable cost of the

trial of the issues must be regarded as an expense of administration. The court then continues:

> "A last will and testament is a solemn instrument, and the testator, who legally has the dominion over his estate, and the power to appoint an executor to carry out the dispositions he desires to make of it, should be allowed to close his eyes in death with the assurance at least that a reasonable effort will be sanctioned by the law to sustain his will, at the expense of his own estate. If the share that would otherwise have gone to his next of kin shall be lessened thereby, it is presumably caused by the testator himself, who had the right, *prima facie,* to appropriate his property as he might see fit; and the formal execution of his will should authorize his executor to use a reasonable part of his estate to establish and carry out that will."

The executor was not a party to the compromise agreement and surrendered none of his rights.

Counsel for appellees contended below that the parties to the agreement intended that the only charges by which the estate was to be reduced were Morgan's debts existing at the time of his death, without reference to subsequent liabilities of attempted administration (R. 29-30).

But it will be noticed that the executor did not sign the compromise agreement and was not a party thereto. He relinquished none of his rights in the estate. What the parties to that agreement did, or intended to do, in no way affected his interests. Nothing but the clearest expression or unmistakable conduct should be construed to mean that the executor had assumed and would pay personally certain obligations for counsel fees he had incurred by order of the court and would release from liability and save harmless the estate for whose benefit the obligations had been incurred. The executor did not agree that only the debts of Morgan should be paid, nor that the estate should be

divided as of the time of his death, and these without reference to subsequent liabilities of administration.

If there was any such agreement, it was made between the parties to it, but they could not bind the executor.

But the parties to the agreement could never compromise so as to deprive the executor of his rights, because he derives his authority and substantial financial interest in the estate, not from the parties, nor the court, but from testator. Tuohy vs. Hanlon, 18 App. D. C., 231.

The Morgan children had no interest in the estate until the will was admitted to probate and record and they took subject to the executor's rights.

Counsel for appellees contends that the allowance should be denied because the service of executor's counsel was not to the interest or advantage of the Morgan infants, but adverse to them. But it can not be denied that by reason of the service of executor's counsel, the will was admitted to probate and record. Its admission to probate was provided for in the first paragraph of the compromise agreement (R. 5). It was not until this act was accomplished through executor's counsel that the rights of the Morgan children accrued. By this compromise agreement, after the will was admitted to probate and record, all the property went to the legatees and devisees under the will and they in turn agreed to give to the Morgan children one-half of the estate received by them under the will. But the legatees and devisees themselves were not entitled to the whole estate left by the deceased, but only to that estate as shown to exist after the allowance of the reasonable costs of administration. Tuohy vs. Hanlon, 18 App. D. C., 234.

So it is very clear that the interest the children take in the estate was secured through the negotiations of executor's counsel leading to the compromise agreement. The executor's duty was to secure probate of the will. This he ac-

complished and by and through the probate of the will the children obtained the only interest they could receive in the estate, and before and at the time their interest accrued, the executor had employed his counsel and the counsel had rendered the service for which the executor is now seeking this allowance. So it is only just that the share of the children in this estate should be proportionately diminished by the liabilities that have been incurred for the creation and preservation of their interests.

So at the very time this compromise agreement was entered into, attorneys for appellees testified they had knowledge of the executor's authority to employ counsel and assumed it had become effective, and so it logically follows that they must have presumed that the executor's counsel would be compensated from the estate (R. 26).

The court and the appellees have by their conduct placed a practical interpretation upon the compromise agreement by which costs and expenses of administration were allowed.

Looking at the schedule of credits allowed the executor (R. 27), it will be seen that besides the debts of Morgan existing at the time of his death, the Auditor allowed, and the court with no dissent from counsel approved, items in the executor's account aggregating $1,360.59, all of them falling in the category described by appellees' counsel as subsequent liabilities of attempted administration (R. 29-30). Among said items are the following:

Stenographic report of trial	$313.00
Deposit for clerk and marshal's costs	35.00
Printing briefs in Court of Appeals	51.50
Costs to Register of Wills	53.98
Costs in Court of Appeals	97.90
Witness fees	52.50
Executor's commission	756.71
	$1,360.59

Counsel for appellees filed no exception to these allowances, but according to appellees' construction of the agreement contended for here, even the funeral and burial expenses, amounting to $173.25 (R. 27), allowed and passed, could not have been paid out of the estate under the terms of the agreement, although funeral expenses constitute the first claim the law requires the personal representative to pay from the assets of the estate in the settlement of his accounts (Code Sec. 365).

These allowances and the executor's counsel fee stand on exactly the same footing so far as the agreement is concerned. According to the terms of the agreement all should have been allowed, or none allowed. But counsel for appellees put a practical interpretation upon the aforesaid agreement in allowing the said expenses. If the terms of this agreement are in doubt, then the practical construction given by the appellees in allowing these expenses should be looked to and is of great weight, if not controlling.

Topliff vs. Topliff, 122 U. S., 121.
Lowber vs. Bangs, 2 Wall., 728.
D. of C. vs. Gallaher, 124 U. S., 505.
Consaul vs. Cummings, 24 App. D. C., 36.

The lower court should be reversed and the fee allowed in the executor's account.

Respectfully submitted,

NOEL W. BARKSDALE,

Attorney for Appellant.

In the Court of Appeals

OF THE DISTRICT OF COLUMBIA.

No. 2084.

NOEL W. BARKSDALE, EXECUTOR OF THE ESTATE OF CHARLES R. MORGAN, DECEASED, APPELLANT,

vs.

EDWARD F. MORGAN, HELEN E. MORGAN, JOHN R. MORGAN, AGNES V. HOPPE, MARIE M. L. MORGAN, CHARLES H. MORGAN, MALCOLM A. MORGAN, CHARLES GUY MORGAN, AND HELEN HOPPE, APPELLEES.

Brief for Appellees, Marie M. L. Morgan, Charles H. Morgan, and Malcolm A. Morgan.

J. K. M. NORTON,
HENRY E. DAVIS,
Solicitors for Appellees.

THE LAW REPORTER PRINTING CO., WASHINGTON, D. C.

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Brief for Appellees, Marie M. L. Morgan, Charles H. Morgan, and Malcolm A. Morgan.

Statement of the Case.

Charles R. Morgan died on the twenty-fourth day of October, 1905, leaving a last will and testament, dated February 23, 1905, by which he appointed appellant as executor. In this will testator disinherited his infant children, Marie M. L. Morgan, Charles H. Morgan and Malcolm A. Morgan. The said appellees contested the probate of the will, and a jury found in their favor, against the will. An appeal was taken by the appellant, and

he was represented in that matter by his partner, Andrew A. Wilson. This court reversed the judgment of the trial court, and remanded the cause for a new trial. Before a new trial was had, an agreement was entered into between these appellees, who were the infant children of Charles R. Morgan, and the other parties in interest, who were maintaining the probate of the will of the said Charles R. Morgan. That agreement (Rec., p. 5) provided:

1. That the will should be admitted to probate.

2. That, "The estate of Charles R. Morgan, after the payment of all debts, shall be equally divided in value, one-half to be the property of the children of Charles R. Morgan, *as of the date of the death of Charles R. Morgan*, and the other half to be the property of the devisees, under the will of Charles R. Morgan; *a deed to be made to the said children for said one-half.* The sum of one thousand (1,000) dollars to be considered as a debt due by the estate of Charles R. Morgan to Edward F. Morgan, with interest from the date of note held by him."

Charles R. Morgan had executed certain deeds of trust upon his property. The trustees under these deeds of trust were appellant, Noel W. Barksdale and Andrew A. Wilson. These trustees sold the property under the deeds of trust, and, after paying the debts secured, turned over the balance of the proceeds to Noel W. Barksdale, as executor of Charles R. Morgan.

A bill was filed by appellant for the settlement of the estate (Rec., pp. 1–5), the prayers of the bill being for a ratification of the aforesaid compromise agreement, and that the appellant be allowed to make settlement, under the direction of the court. By decree (Rec., p. 20), entered on the 15th of April, 1909, among other things therein provided for, the cause was referred to the auditor "to advertise for creditors and state the executor's account."

Andrew A. Wilson appeared before the auditor and presented a claim against the estate for two thousand (2,000) dollars as compensation for services in representing the appellant in the proceedings for the probate of the said will. These appellees resisted the allowance of any fee to the said Wilson as a charge against their one-half of the estate of Charles R. Morgan, which they took under the said compromise agreement. The auditor, however, allowed the said claim of the said Wilson for the sum of two thousand (2,000) dollars as a charge against the estate of the said Charles R. Morgan. These appellees excepted to the auditor's report on the ground that these services, or any part thereof, could not be charged against the one-half of the estate of Charles R. Morgan, which they took under the above compromise agreement (Rec., p. 29).

By decree, entered on the eleventh day of October, 1909 (Rec., p. 30), the exception of these appellees was sustained, as to the two thousand (2,000) dollars allowed by the auditor to the said Andrew A. Wilson, as a charge against the estate of Charles R. Morgan.

Motion to Dismiss.

These appellees move to dismiss this appeal, on the ground that the appellant has no interest in the appeal—

First, because, as executor of the estate of Charles R. Morgan, he should resist any claims against the estate, or, at least, remain neutral, and,

Second, because, as executor, he has no interest in the claim presented by Andrew A. Wilson, and, certainly, has no right to appeal from a decree denying the claim.

The first appearance of the claim was before the auditor. Andrew A. Wilson appeared and presented his

claim. The auditor allowed it, and the court, in its decree, disallowed it.

It is submitted:

That Mr. Wilson is the only one who could have appealed from the decree of the court disallowing his claim, and that, not having done so, this appeal must be dismissed.

ARGUMENT.

It will be noticed from the very terms of the compromise agreement, under which the will was allowed to be probated, that these appellees, as the children of Charles R. Morgan, are entitled to receive, in value, one-half of the property of the said Charles R. Morgan, "*as of the date of the death of Charles R. Morgan.*"

It will be further noticed that this agreement expressly provided that the sum of $1,000 was to be considered as a debt due by the estate to Edward F. Morgan. If it had been intended to present a claim, as a debt against the estate, for counsel fee to the attorney representing the proponents of the will, it should have been mentioned in the agreement. The agreement expressly provided that appellees were to receive, in value, *one-half of the estate, as of the date of the death of their father.* If the fee to the said Wilson, as counsel in favor of the will in the probate proceedings, is allowed, then it must be apparent that the appellees, the children of Charles R. Morgan, will not receive one-half of the property as of the date of the death of their father. The agreement is perfectly plain and needs no construction.

Again, in expressly providing that a certain sum should be considered as a debt against the estate in favor of Edward F. Morgan, it excludes the idea that

the claim of Wilson could be considered as a debt, one-half of which would come out of the property of the appellees.

No debt can be created against a dead man or his estate. It is only by virtue of some statute or local rule of the jurisdiction, that any liability can be created by an executor to be paid by him as a part of the expenses of administration. A personal representative can not be sued, as such, for services or goods furnished to his testator's estate since his death.

Fitzhugh's Exr. *vs.* Fitzhugh, 11 Grat, 300 (Va.), 62 Am. D., 653. So that the claim of Wilson can not be considered as a debt against the estate of Chas. R. Morgan, payment of which was provided for in the compromise agreement.

And lastly, there was no mention or thought of such a claim, at the time of the compromise agreement (testimony of Davis and Norton, Rec., p. 26).

Not to extend this brief, the court's attention is especially called to the exceptions found on page 29 of the record, which are asked to be considered as a part of this brief.

Conclusion.

It is submitted:

1. That appellant has no right to maintain this appeal, and that the same should be dismissed.

2. That Andrew A. Wilson not having appealed from the decree of the court disallowing his claim, appellant can not make this appeal for him.

3. That on the merits, the said claim can not be allowed against the appellees, because it is in direct violation of the compromise agreement.

Respectfully submitted.

J. K. M. NORTON,
HENRY E. DAVIS,
Solicitors for Appellees.